

***What Every Member of the
Trade Community Should Know About:***

Buying and Selling Commissions



An Advanced Level
Informed Compliance Publication of the
U. S. Customs Service

June, 1996

INTRODUCTION

On December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), which is also known as the Customs Modernization Act or “Mod Act,” became effective. These provisions amended many sections of the Tariff Act of 1930 and related laws. Two new concepts which emerge from the Mod Act are “*informed compliance*” and “*shared responsibility*.” These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the Mod Act imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met. The Customs Service is then responsible for fixing the final classification and value of the merchandise. The failure of an importer of record to exercise reasonable care may lead to delay in the release of merchandise or the imposition of penalties.

My office has been given a major role in meeting Customs informed compliance responsibilities. In order to provide information to the public, Customs intends to issue a series of informed compliance publications, and possibly cd-roms and videos, on topics such as value, classification, entry procedures, determination of country of origin, marking requirements, intellectual property rights, recordkeeping, drawback, penalties and liquidated damages.

The Value Branch in the International Trade Compliance Division of the Office of Regulations and Rulings has prepared this publication on **Buying and Selling Commissions**, as part of a series of informed compliance publications regarding the appraisal of merchandise. It is hoped that this material, together with seminars and increased access to Customs rulings, will help the trade community in improving voluntary compliance with the Customs laws.

The information provided in this publication is for general information purposes only. Recognizing that many complicated factors may be involved in customs valuation issues, an importer may wish to obtain a ruling under Customs Regulations, 19 C.F.R. Part 177, or obtain advice from an expert (such as a licensed Customs Broker, attorney or consultant) who specializes in Customs valuation. Reliance solely on the general information in this pamphlet may not be considered reasonable care.

Comments and suggestions are welcomed, and should be addressed to me at the Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW (Franklin Ct. Bldg), Washington, DC 20229.

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TABLE OF CONTENTS

How is imported merchandise appraised?

What is transaction value?

How does the role of an intermediary affect transaction value?

What is the difference between buying and selling commissions?

How are buying and selling commissions treated under the TAA?

When are buying commissions included in transaction value?

What are some examples of services which are often provided by buying agents?

When is the intermediary a *bona fide* buying agent?

What are some indications that the intermediary is not a *bona fide* buying agent but rather an independent seller?

What is the significance of a buying agency agreement or the absence of such an agreement?

What if the seller and the intermediary are related?

Who has the burden of proof to establish the existence of a *bona fide* buying agency?

How should buying commissions be shown on the commercial documents?

What documentary evidence is needed to prove the existence of a *bona fide* buying agency?

What happens if the importer does not prove the existence of a *bona fide* buying agency?

When is the intermediary a selling agent? Does an importer have an obligation to report commissions to Customs upon entry of the merchandise? Additional Information

WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: BUYING AND SELLING COMMISSIONS

How is imported merchandise appraised?

All merchandise imported into the United States is subject to appraisement. The Trade Agreements Act of 1979 (“TAA”) sets forth the rules for appraisement of imported merchandise. The preferred method of appraisement under the TAA is **transaction value**.

What is transaction value?

The transaction value of imported merchandise is the price actually paid or payable for merchandise when sold for exportation to the United States, plus certain statutorily enumerated additions. For further information see the informed compliance publication “*Customs Value*”, May, 1996.

How does the role of an intermediary affect transaction value?

Many import transactions involve a party (or parties) who is neither the seller nor the buyer but an intermediary who assists either the buyer or seller in the purchase or sale of the imported merchandise. Identifying the role of the intermediary is important in determining the transaction value of the imported merchandise. An intermediary may function as either a buying or selling agent or as an independent buyer/seller. When the intermediary is functioning as an agent, the actual sale is between the foreign seller and the buyer with the agent acting as a facilitator. In such case, the issue to be decided is whether the commissions the agent receives for its services are part of the transaction value of the imported merchandise. This informed compliance publication explains the differences between buying and selling agents, buying and selling commissions, and the ramifications of each for appraisement purposes.

When the intermediary is functioning as an independent buyer/seller, the issue to be decided is which sale is the sale for exportation for purposes of transaction value (the sale between the manufacturer/seller and the intermediary or the sale between the intermediary and the importer/buyer). The criteria used to determine whether the intermediary is functioning as an independent buyer/seller and if so, which is the sale for exportation is the subject of the informed compliance publication, “*Bona Fide Sales and Sales for Exportation*”.

What is the difference between buying and selling commissions?

In legal terms, in an agency relationship, one party is called the agent and the other party, the principal. An agent is a person who performs actions on behalf of the principal. The fees the agent receives for its services are called commissions. Typically, the commission is equal to an agreed upon percentage of the price of the goods. In a buying agency, the principal is the buyer

and in a selling agency, the principal is the seller. Buying commissions are fees paid to a *bona fide* buying agent for the services it performs on behalf of the buyer in connection with the purchase of the imported goods. Selling commissions are fees paid to a selling agent for the services it performs on behalf of the seller in the sale of the imported goods. It is important to note that when the intermediary is acting as an agent, it is not the actual buyer or the actual seller of the imported goods but rather, a party who is performing services on behalf of either the buyer or the seller.

How are buying and selling commissions treated under the TAA?

Selling commissions incurred by the buyer with respect to the imported merchandise are one of the specified additions to the price actually paid or payable. An addition is to be made for such selling commissions unless they are already included in the price. (For example, if the seller pays its agent a commission and includes this amount in the price it charges the buyer for the imported goods, no addition is made for the selling commission since it is already included in the price). Selling commissions incurred by the buyer with respect to the imported merchandise are included in the transaction value either as part of the price actually paid or payable or as an addition thereto.

Buying commissions are not one of the specified additions to the price actually paid or payable. Therefore, no addition is made for *bona fide* buying commissions incurred by the buyer (that is, commissions paid to a *bona fide buying agent* who meets the criteria discussed in this publication). Except as noted below, *bona fide* buying commissions are not included in the transaction value of the imported merchandise.

When are buying commissions included in transaction value?

Buying commissions are included in the transaction value of the imported merchandise when they are part of the total payment made by the buyer to the seller. This is because the TAA does not authorize any deductions from the price actually paid or payable for buying commissions. (Example, the manufacturer bills the importer \$100 for the imported merchandise and the importer pays this amount to the manufacturer. This price includes a \$5 buying commission which the manufacturer will pay to the buying agent upon receipt of the \$100 payment from the importer. Even if Customs is satisfied that the intermediary is a *bona fide* buying agent, the total payment made by the buyer to the seller is \$100 and no subtraction would be made for commissions the buying agent receives).

What are some examples of services which are often provided by buying agents?

Examples of services which are characteristic of those rendered by a buying agent include compiling market information, gathering samples, translating, informing the seller of the desires of the buyer, locating suppliers, placing orders based on the buyer's instructions, procuring the merchandise, assisting in factory negotiation, inspecting and packing merchandise, and arranging for shipment and payment. This is not an exhaustive list.

When is the intermediary a *bona fide* buying agent?

The courts have said that no single factor is determinative. Whether a person is a *bona fide* buying agent depends upon the all the relevant facts of each case and the totality of the evidence. The fact that a person is called a buying agent does not mean that he/she is in fact a *bona fide* buying agent. Also, the fact that a person enters into a buying agency agreement with the buyer does not mean that such person is a *bona fide* buying agent. Having authority to act as a *bona fide* buying agent is not the same as actually performing as one. What needs to be considered is whether the services actually performed by the agent is what the parties agreed to and whether such actions are consistent with a *bona fide* buying agency.

In order to be considered a *bona fide* buying agent, the purported agent must be acting on behalf of and primarily for the benefit of the buyer, rather than for the seller or himself/herself. The main factor which determines whether a party is a *bona fide* buying agent is the right of the buyer to control the agent's conduct with respect to those matters entrusted to the agent. The buyer should control the purchasing process and the buying agent should take directions from the buyer and act upon the buyer's instructions. For example, a buying agent usually does not control who the manufacturer is or what is to be purchased. Normally, the buyer makes such decisions and the buying agent carries them out. Also, a buying agent usually does not control the manner of payment and other significant aspects of the purchase. While a buying agent may exercise some discretion, the ultimate purchasing decisions should be made by the buyer and not by the buyer's agent. The more discretion the purported agent has, the less likely it is that such person is a *bona fide* buying agent.

Some factors considered by the courts which go to the main issue of "control" are: 1) which party bears the risk of loss for lost or damaged merchandise? (generally, a buying agent does not bear the risk of loss); 2) who absorbs the cost of shipping and handling? (buying agents generally do not absorb such costs); 3) which party controls the manner of payment for the goods? (generally, a buying agent would not control how and when the seller is paid); 4) could the buyer purchase from the manufacturers without using the services of the agent (if the answer is no, the agent may be a selling agent); 5) was the intermediary operating an independent business primarily for its own benefit? (if the answer is yes, it is possible that the intermediary is not an agent but an independent seller); 6) is the intermediary financially detached from the manufacturer or seller? (if not, it is possible that the intermediary may not be acting on behalf of the buyer, but on behalf of the seller); 7) what do the commercial documents show? (*e.g.*, how are the parties referred to in the commercial documents; is there a buying agency agreement; is there a purchase agreement and if so, who are the parties thereto).

In many cases, a written buying agency agreement is entered into between the buyer and the buying agent which outlines the responsibilities of each party and sets forth the amount of commissions that are to be paid. In such case, the terms of the agreement should be reviewed to see whether they are consistent with a buying agency and whether the purported agent is actually performing the functions as provided in the agreement.

The totality of the evidence must be examined in order to determine whether there is a

bona fide buying agency. The bottom line: does the evidence prove that the buyer is the party in control and that the purported agent is working for the buyer and not the seller or himself/herself?

What are some indications that the intermediary is not a *bona fide* buying agent but rather an independent seller?

In some cases an intermediary may not be functioning as an agent at all, but rather as an independent buyer/seller. In such case, the amount that is referred to as the buying commission may actually be the intermediary's mark-up or profit which would constitute part of the total price paid by the buyer and part of transaction value. Some indications would be that the intermediary operates an independent business primarily for its own benefit, that it has unlimited discretion regarding the purchase of the goods from the seller, that the purported buyer and seller have no direct contact, and that the intermediary obtains title to the goods. For further discussion, see Informed Compliance Publication "*Bona Fide Sales and Sales for Exportation*".

What is the significance of a buying agency agreement or the absence of such an agreement?

A written buying agency agreement which sets forth the obligations of the buyer and agent is evidence of the buying agency. However, it is not determinative. While the agreement is important, it is more important to consider whether the parties are actually doing what they agreed to do. For example, the fact that the agreement indicates that the agent must obtain the buyer's written approval before entering into an agreement with the seller is meaningless if the purported agent never obtains the buyer's written approval. Also, the fact that the agreement indicates that the buyer will be responsible for selecting the manufacturer is meaningless if the purported agent selects the manufacturer. Where the actions of the parties indicate that the buyer maintains little or no control over the agent, there is no *bona fide* buying agency relationship, even if the agreement provides otherwise.

The absence of a buying agency agreement does not necessarily preclude the existence of a *bona fide* buying agency relationship. However, it will be very difficult to establish one without it.

What if the seller and the intermediary are related?

Since a buying agent is supposed to be acting on behalf of the buyer and in the best interests of the buyer, it is more difficult to show that the intermediary is a *bona fide* buying agent when it is related to the seller. The courts have said that while a relationship between the buying agent and the seller does not preclude the existence of a buying agency, the circumstances surrounding such transactions are subject to closer scrutiny. One factor that Customs has looked at in these cases is whether the purported agent always obtains the imported merchandise from the related seller or whether it also regularly uses unrelated sellers. If the purported buying agent obtains the imported merchandise only from its related seller, it will be

difficult for the importer to show that the agent is acting in the best interests of and under the direction and control of the buyer and a finding of a *bona fide* buying agency is unlikely. Another relevant factor when the seller and the intermediary are related is whether any of the commissions paid by the buyer inure to the benefit of the seller. If they do, this would not be consistent with a *bona fide* buying agency relationship.

Who has the burden of proof to establish the existence of a *bona fide* buying agency?

The importer has the burden of proving the existence of a *bona fide* buying agency relationship. Absent sufficient proof, commissions paid by the importer will be included in the transaction value of the imported merchandise.

How should buying commissions be shown on the commercial documents?

There is no one invoicing method that must be used with regard to buying commissions. However, the method used (along with the method of payment) can either facilitate a determination of non-dutiable buying commissions or make such a finding more difficult. The method of invoicing and the method of payment is part of the total evidence that must be considered before a determination can be made regarding the status of so-called buying commissions. For example, the easiest way to show that the middleman is not a seller and that the payments to the middleman represent buying commissions is for the seller to invoice the buyer for the purchase price of the imported merchandise and for the middleman to invoice the buyer separately for its commissions. The buyer would then pay the seller for the goods and separately pay the middleman for its services. This method clearly shows the price paid for the imported merchandise and the amount of the commission.

What documentary evidence is needed to prove the existence of a *bona fide* buying agency?

Before an importer declares the commissions as non-dutiable buying commissions, the importer should be satisfied that the totality of the evidence demonstrates that the purported agent is a *bona fide* buying agent and not a selling agent nor an independent seller. The importer should be prepared to submit evidence which proves its claim. At a minimum, an invoice or other documentation from the seller, showing who the seller is, and establishing the price actually paid or payable for the imported goods must be submitted at the time of entry or upon demand by Customs if not requested at the time of entry. Any buying commissions should be shown separately from the price actually paid or payable for the imported merchandise. Any written buying agency agreement, invoices pertaining to the payment of buying commissions and other evidence of the buying agency should be submitted at the time of entry or upon request by Customs. The final determination of whether the commissions paid are *bona fide* buying commissions is made by Customs based on the documentation submitted.

What happens if the importer does not prove the existence of a *bona fide* buying agency?

Where an intermediary is involved in the import transaction and the importer cannot establish its role as a *bona fide* buying agent, depending on the facts presented, the intermediary will be considered either a selling agent or an independent seller. An importer who declares commissions as non-dutiable buying commissions without the evidence to back up its claim would not be exercising reasonable care and may be subject to penalty or other enforcement compliance action.

When is the intermediary a selling agent?

The same agency principles applicable to buying agents also apply to selling agents. However, in a selling agency, the principal is the seller. A selling agent represents the interests of the seller, rather than the buyer, in the sale of the imported merchandise. A selling agent may seek customers, collect orders, or otherwise assist the seller in the sale of the imported merchandise. In the case of a selling agency, the seller controls the actions of the selling agent with respect to those matters entrusted to the agent. For example, an importer may arrange for the purchase and importation of the merchandise with the seller's agent, rather than the seller. A selling agent could negotiate with the importer, on behalf of the seller, concerning the sale of the imported goods. However, it is the seller, and not its agent, who has the ultimate authority with respect to the sale of the goods. If the intermediary has complete discretion regarding the sale of the goods, and/or obtains title and ownership from the seller, the intermediary would be considered an independent buyer/seller and not a selling agent.

When the intermediary and the seller are related, close scrutiny is required in ascertaining whether the intermediary is a *bona fide* buying agent or a selling agent. When the intermediary always obtains imported merchandise from its related sellers, it is likely that the intermediary is actually a selling agent. A similar result would be reached if any or all of the commissions paid by the buyer inure to the benefit of the seller.

Unless already included in the price, all selling commissions incurred by the buyer with respect to the imported merchandise are to be added to the price actually paid or payable for those goods.

Does an importer have an obligation to report commissions to Customs upon entry of the merchandise?

Yes. The importer is required to sign a declaration on the Customs Form 7501 submitted at the time of entry, which indicates among other things, that the submitted invoices include commissions. In this regard, 19 U.S.C. §1481, as amended, specifies that all invoices of merchandise to be imported into the United States and any electronic equivalent thereof shall prescribe, among other things, all charges upon the merchandise, including commissions. In addition, 19 U.S.C. §1481 requires the furnishing of any other facts deemed necessary to a

proper appraisement of the merchandise. 19 U.S.C. §1484, as amended, provides that an importer shall, using reasonable care complete the entry by filing with the Customs Service the declared value, ... and such other documentation or, pursuant to an electronic data interchange system, such other information as is necessary to enable the Customs Service to properly assess duties on the merchandise. This would include sufficient information to enable Customs to determine whether any commissions were paid by the buyer in connection with the imported merchandise and if so, whether they are buying or selling commissions. Therefore, invoices relating to the payment of the imported merchandise and the payment of commissions (both buying and selling commissions) and other relevant information discussed above should be provided to Customs. An importer who fails to declare commissions would not be exercising reasonable care and may be subject to penalty or other enforcement compliance action.

Additional Information

Publications

Customs Valuation Under the Trade Agreements Act of 1979 is a 96-page book containing a detailed narrative description of the customs valuation system, the customs valuation title of the Trade Agreements Act (§402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. §1401a)), the Statement of Administrative Action which was sent to the U.S. Congress in conjunction with the TAA, regulations (19 C.F.R. §§152.100-152.108) implementing the valuation system (a few sections of the regulations have been amended subsequent to the publication of the book) and questions and answers concerning the valuation system. A copy may be obtained from the U.S. Customs Service, Office of Regulations and Rulings, Value Branch, 1301 Constitution Avenue, N.W., Franklin Court Building, Washington, D.C. 20229.

Customs Valuation Encyclopedia (with updates) is comprised of relevant statutory provisions, Customs Regulations implementing the statute, portions of the Customs Valuation Code, judicial precedent, and administrative rulings involving application of valuation law. A copy may be purchased for a nominal charge from the Superintendent of Documents, Government Printing Office, P.O. Box 371954, Pittsburgh, Pennsylvania 15250-7054.

What Every Member of the Trade Community Should Know About: Customs Value is a basic level informed compliance publication of the Customs Service which discusses the Customs valuation laws. Copies may be downloaded from the Customs Electronic Bulletin Board (see below).

Customs Regulations

The current edition of *Customs Regulations of the United States*, in loose-leaf format, is available by subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. The bound 1996 Edition of Title 19, *Code of Federal Regulations*, which incorporates all changes to the *Customs Regulations* from April, 1995 through March, 1996 will be available for sale from the same address. All proposed and final

regulations are published in the *Federal Register* which is published daily by the Office of the Federal Register, National Archives and Records Administration, and distributed by the Superintendent of Documents. Information on on-line access to the *Federal Register* may be obtained by calling (202) 512-1530 between 7 a.m. and 5 p.m. Eastern time.

Customs Bulletin

The *Customs Bulletin and Decisions* (“*Customs Bulletin*”) is a weekly publication which contains decisions, rulings, regulatory proposals, notices and other information of interest to the trade community. It also contains decisions issued by the U. S. Court of International Trade and Customs related decisions of the U. S. Court of Appeals for the Federal Circuit. Bound volumes are issued annually. The *Customs Bulletin* is available for sale from the Superintendent of Documents.

Customs Electronic Bulletin Board

The Customs Electronic Bulletin Board (CEBB) is an automated system which provides the entire trade community with current, relevant information regarding Customs operations and items of special interest. It was established as another effort to promote the Customs Service as “trade friendly” within the importing and exporting community. The CEBB posts timely information including proposed regulations, news releases, Customs publications and notices, etc which may be “downloaded” to your own PC. The Customs Service does not charge the public to use the CEBB. You only pay telephone charges. To use the CEBB, you must have a personal computer with a modem. The CEBB supports modem speeds from 2400 to 28,800 baud. Set up your terminal as ANSI, set databits to 8, set parity to N and stopbits to 1. Dial (703) 440-6155 and log on with your name and choose a password. After a few questions, you are set to get up-to-date information from Customs. If you have any questions about the CEBB, call (703) 440-6236.

Additional information may be obtained from Customs ports of entry. Please consult your telephone directory for a Customs office near you. The listing will be found under U.S. Government, Treasury Department.

The information provided in this publication is for general information purposes only. Recognizing that many complicated factors may be involved in customs valuation issues, an importer may wish to obtain a ruling under Customs Regulations, 19 C.F.R. Part 177, or obtain advice from an expert (such as a licensed Customs Broker, attorney or consultant) who specializes in Customs valuation. Reliance solely on the general information in this pamphlet may not be considered reasonable care.